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No. 91-1348

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MADISON CABLEVISION, INC.,
Petitioner,
v.
THE CITY OF MORGANTON, NORTH CAROLINA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. THE FIRST AMENDMENT ISSUES ARE PLAINLY EVIDENT IN THE CITY'S ARGUMENT THAT ITS ACTIONS ELIMINATING PRIVATE CABLE TELEVISION SERVICE AND ESTABLISHING A GOVERNMENT CABLE SYSTEM ARE JUSTIFIED

The City suggests the Court need not consider the First Amendment issues raised by its establishment of a municipal cable television system and its prohibition of private cable service, characterizing its appropriation of a medium of expression exclusively for government use as simply "a decision [by the City] to put its own property to optimal use" (Opp. Br. 14), and equating its actions with routine municipal decisions like choosing a parade route or issuing rules for the use of city parks. Accord-

ing to the City, it "had to choose among competing applicants to build a cable system on public property." (Opp. Br. 14) That formulation of the issues, of course, begs the constitutional question by assuming that the First Amendment indeed allows cities to restrict the use of the medium of cable television to a single provider selected by the City or allows cities to decide that private cable service can be prohibited altogether in order to ensure the success of a municipal system.[1]

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .

Buckley v. Valeo, 424 U.S. 1, 48-49 (1976). The idea that government may restrict private speech through a particular medium in order to foster speech by the government is even more foreign to the First Amendment.

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[1] The City questions Madison's "standing" to pursue its challenge to the City's franchising process on the theory that Madison has not demonstrated that it would prevail if the franchising process were repeated. (Opp. Br. 15) That reasoning, once again, assumes that the City's auction process is constitutionally permissible—the very issue to be decided. Equally important, there is no requirement that a party demonstrate that the responsible government agency would change its decision in order to seek judicial review of unconstitutional action. The cable company in the case of *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), refused to participate at all in the Los Angeles bidding process and clearly would not have been granted a franchise by the City under any circumstances. The City of Los Angeles pressed the standing argument in that case. (Petitioner's Br. 40-41) This Court nevertheless reviewed the City's actions and remanded the case for full adjudication of the disputed factual issues and evaluation of the First Amendment issues under the test established in *United States v. O'Brien*, 391 U.S. 367 (1968). In this case, the lower courts did not deny relief on the basis of standing and there is no merit to the suggestion that petitioner lacks standing to maintain this action. *See Valley Forge Christian College v. Americans For Separation of Church & State*, 454 U.S. 464 (1982).

Yet that is precisely the result in this case and is why the lower courts' decision merits review by this Court.

The only decision by this Court on the question of city authority to control cable television, *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), refused to give blanket approval for the use of an "auction" franchising process and required the federal courts to examine the underlying assumption that only one cable television operator should be allowed to provide service. In *Preferred*, this Court determined that the federal courts were required to weigh the First Amendment values of freedom of speech and press against the interest of protection of the public rights-of-way and other competing "societal interests." 476 U.S. at 495-96. Using the analysis articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), the Court reiterated in *Preferred* that the federal courts were required to use heightened scrutiny to judge municipal actions that have the effect of restricting speech through the medium of cable television. The decision of the lower court was remanded for a factual determination of whether the public rights-of-way could accommodate the facilities of more than one cable television system.

Here, the lower courts effectively abandoned the constitutional requirement for factual development and critical analysis of the governmental interests advanced to justify a restriction on the media. Instead, the trial court concluded as a matter of law "that the case should be decided on the basis of the record before the [City] Council" (Pet. App. 19a-20a), prohibited all discovery and resolved the key factual issues against Madison despite its evidence controverting the City's claims.[2] The court of ap-

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[2] Madison did present competent evidence to establish that the utility poles and rights-of-way in Morganton could accommodate a second cable system. Madison also sought discovery from the City, which owned the utility poles in question, on this issue, but the district court prohibited all discovery by Madison, accepting the

peals adopted the reasoning of the district court. In approving the City's actions without the benefit of discovery and meaningful adjudication of the disputed facts, the lower courts failed to fulfill their constitutional obligation of independent judicial review, deferring instead to the judgment of the City Council as a "legislative body" on every issue of fact.

In addition to assuming the factual validity of each rationalization put forward by the City, the lower courts also failed to scrutinize the asserted governmental interests to ensure, as required by *O'Brien* and *Preferred*, that the restriction on expressive activity was no greater than necessary to serve those interests.[3] The district court

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City's contention from the outset that discovery of any kind, including the facts concerning the physical capacity and status of the rights-of-way, would represent an impermissible intrusion into the decision-making processes of the City and its officials. Madison expressly opposed the City's premature motion for summary judgment, filed simultaneously with the Answer, on the grounds that Madison had been denied an opportunity for discovery. The district court ignored the procedural irregularities and granted summary judgment without comment on Madison's arguments. Madison renewed its procedural objections on appeal, but the court of appeals adopted the district court opinion as its own without elaboration.

[3] In its brief, the City attributes to Madison, in the form of a purported quotation from Madison's petition to this Court, a statement that was never made. On page 13 of its brief, the City chides Madison for asserting that the City was required to demonstrate that its actions constituted the "least restrictive alternative." A review of the cited pages of the petition (Pet. at 12-13) will reveal that Madison stated the constitutional requirement correctly, i.e., that the government must demonstrate that its actions were no more restrictive of First Amendment rights than necessary, not that it was required to demonstrate that it had chosen the least restrictive alternative. The error in the courts below was that they failed to consider alternatives at all. The City argued below, as it does now, that it was not required to consider less restrictive measures because its "ownership" of the public rights-of-way gives it absolute power to control their use, even for expressive activity protected by the First Amendment. The lower courts accepted this reasoning and erred in not evaluating whether the City's interests in limiting use

found that granting "a single franchise furthers the following substantial government interests: prevention of disruption in city streets and rights of way; conservation of the space on city utility poles; and ensuring that public rights of way are optimally used, in a manner that serves the public interest." (Pet. App. 17a-18a) (Citations omitted.) In approving the City's justifications for regulation, the district court did not weigh the asserted governmental interests against the countervailing values of protection of freedom of speech and the press. The court assumed that the disruption caused by a second cable system would be intolerable, and entered summary judgment accordingly, despite Madison's evidence that a second system could be accommodated through routine pole modifications and other common measures used every day in communities throughout the United States.

The district court overlooked its constitutional obligation to assess the City's disruption claims with a critical eye because it accepted the City's argument that as owner of the rights-of-way it could not be required to make any accommodation for the communication facilities of a private company. The City has repeated that argument in its brief to this Court. (Opp. Br. 21-22) In the *Preferred* case, the City of Los Angeles argued to this Court, just as Morganton does now, that it should not be required to allow any increased use of the rights-of-way in order to accommodate a second cable system. The Court rejected that argument and remanded the case for a thorough consideration by the trial court of the capacity of the rights-of-way and the extent of disruption that might be entailed. In this case, the district court refused to make such a determination because it apparently believed, wrongly and without any evidence on the question, that

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of the rights-of-way justified a complete ban on private cable service. Having accepted the City's argument that a prohibition of private cable service was inherently within the City's property rights, it is hardly surprising that the lower courts saw no need for analysis of other alternatives.

the City would have to pay for, or incur the expense of, any modification of utility poles or other facilities that would be required to install a second cable system.

The City makes this expense argument again in its brief to this Court (Opp. Br. 21-22), now claiming that Madison seeks an improper government subsidy for its speech. However, this contention is entirely unjustified. Madison has always accepted its obligation to pay for any changes in the configuration of utility lines and poles, or for other changes made necessary for installation of its facilities. Madison has borne all such expenses during the entire period of the operation of its system. It is an established custom and practice in the utility industry to allocate costs and expenses for construction or improvement of shared facilities to the party requesting expansion. In every instance, whether the utility poles are owned by a city or a private utility, the cable operator is required to pay the cost of any changes in the utility facilities that are required in order to accommodate a cable system. The district court erred when it determined, as a matter of law, that Morganton would be required to bear such expense, and understandably, having been lead erroneously to focus on that question, failed to consider the extent of any disruption that might be involved or to consider ways in which such disruption could be minimized short of prohibiting private cable television service.

The City's argument that this case involves only the "management of public property and public facilities" evidences a troubling disregard for the public benefit of free speech and freedom of the press. The scope of the City's power to limit those protected freedoms in the exercise of its responsibility to manage public property is the issue that warrants attention by this Court.

II. THE PETITION ACCURATELY DESCRIBES THE ACTIONS TAKEN BY THE CITY

In its effort to obscure the obvious First Amendment impact of its decision to usurp control over the medium of cable television, the City seeks to characterize its actions as natural and unavoidable, as though the elimination of Madison's rights and its business was an unintended side effect of some unrelated decision. In truth, it was the City that chose to combine consideration of Madison's right to renewal of its franchise, and the franchise applications of two other private companies, as part of its determination of whether the City should go into the cable business. The City conducted one proceeding, with a single public hearing, and issued one decision dealing with all three private requests simultaneously. The City not only concluded that it would deny the franchise requests of all three private companies and establish a municipal system, it also declared that it would not review the "overbuild situation", i.e., would not consider authorizing a second system, for a period of five years. The City's brief fails to acknowledge this critical fact in its effort to disguise the degree of self-interest in the City's decisions. The statement quoted by the City (Opp. Br. 7) that it would "not foreclose" consideration of future franchise applications was no more than a cosmetic afterthought intended to minimize the harsh reality of the actions taken by the City.

The outcome of the City's deliberations was never in doubt—if the City decided to go into the cable business, it was clear from the beginning, it would not allow any private competition. The economic projections of feasibility for the municipal system were based on the assumption that there would be no competition. The City claims that it did not shut down Madison's private cable system. However, it plainly did so when it refused to authorize continued service by Madison as part of its decision to establish a municipal cable system. Whatever

justifications the City now offers for its actions, it is too late for it to argue that it did not deliberately use its power as the franchising authority to preclude continued service by Madison. The City vigorously defends its right to allow only one cable system on the grounds that cable television is a "natural monopoly." The City glosses over the lack of evidence on this complex issue and the fact that whatever monopoly may have existed was dictated by the City's policy of allowing only a single operator. The result of the City's combined actions is indisputably a government monopoly in Morganton over the medium of cable television. This unprecedented action required a thorough and searching First Amendment examination by the federal courts; instead it was given peremptory treatment and improperly disposed of through summary judgment based on deference to the City's determination of the disputed facts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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